**U.S. Department of Labor**

Office of Administrative Law Judges
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**Issue Date: 21 March 2007**

In the Matter of

C. M.

Claimant

v. Case No. 2004-BLA-05788

SLAB FORK COAL COMPANY

Employer

and

WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND

Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-In-Interest

Appearances:

C. M.
*Pro Se*

Christopher M. Hunter, Esq.
Jackson Kelly, PLLC
For the Employer

Before:

William S. Colwell
Administrative Law Judge

**DECISION and ORDER DENYING BENEFITS**

## INTRODUCTION

This proceeding arises from a subsequent claim for benefits under the Black Lung Benefits Act (the "Act"), 30 U.S.C. §§ 901 *et. seq*. Benefits under the Act are awarded to coal miners who are totally disabled within the meaning of the Act due to pneumoconiosis, or to the survivors of coal miners who were totally disabled due to pneumoconiosis at the time of their deaths (for claims filed prior to January 1, 1982), or whose death was due to pneumoconiosis. Pneumoconiosis, commonly known as black lung, is a dust disease of the lungs resulting from coal dust inhalation. The Act and its implementing regulations define pneumoconiosis as a chronic dust disease of the lungs and its sequelae, including respiratory and pulmonary impairments, arising out of employment in the Nation's coal mines. 30 U.S.C. § 902(b); 20 C.F.R. § 718.201 (2004). In this case, the Claimant, C. M., alleges that he is totally disabled by pneumoconiosis.

The Department of Labor has issued regulations governing the adjudication of claims for benefits arising under the Black Lung Benefits Act at Title 20 of the Code of Federal Regulations. The procedures to be followed and standards applied in filing, processing, adjudicating, and paying claims, are set forth at 20 C.F.R., Part 725, while the standards for determining whether a coal miner is totally disabled due to pneumoconiosis are set forth at 20 C.F.R., Part 718.

I conducted a formal hearing on this claim on January 19, 2006, in Beckley, West Virginia. All parties were afforded a full opportunity to present evidence and argument, as provided in the Rules of Practice and Procedure before the Office of Administrative Law Judges. 29 C.F.R. Part 18 (2004). At the hearing, Administrative Law Judge Exhibits ("ALJX") 1-2 and Director's Exhibits ("DX") 1-23 were admitted into evidence without objection. Tr. 4, 14-15. The Employer has submitted closing argument, and the record is now closed.[1]

In reaching this decision, I have reviewed and considered the entire record pertaining to the claim before me, including all exhibits admitted into evidence, the testimony at hearing, and the arguments of the parties.

## PROCEDURAL HISTORY

This is the Claimant's third claim for benefits under the Act.[2] The Claimant initially filed for benefits on April 4, 1990. DX-1. This claim was denied by a Decision and Order issued on August 10, 1994. The administrative law judge found that Claimant failed to establish that he suffered from pneumoconiosis. DX-1. The

[1] The West Virginia Coal-Workers' Pneumoconiosis Fund is appearing in defense of this claim. The Fund will be referred to as the "Employer."

[2] Claimant has been awarded benefits pursuant to the West Virginia Workers' Compensation Act for occupational pneumoconiosis. DX-2, 9.

administrative law judge did not address the remaining elements of entitlement. The Claimant took no further action on this claim.

The Claimant filed his second claim for benefits on March 18, 1997. DX-2. This claim was denied by the District Director on July 15, 1997 because it was determined that the Claimant failed to establish any element of entitlement. DX-2 The Claimant took no further action on this claim.

The Claimant filed this subsequent claim for benefits under the Act on September 3, 2002. DX-4. On June 24, 2003, after the initial development of the record, the District Director issued a *Schedule for the Submission of Additional Evidence*. DX-16. The District Director concluded that the Claimant would be not entitled to benefits if a decision on the merits were issued at that time. On November 6, 2003, the District Director issued a *Proposed Decision and Order – Denial of Benefits*. DX-17. By letter dated December 2, 2003, the Claimant requested a formal hearing. DX-18. Pursuant to this request, this claim was referred on February 25, 2004 to the Office of Administrative Law Judges for a formal hearing as noted above. DX-20. The initial hearing in this matter was originally scheduled for June 8, 2005. On that date, Claimant appeared for the hearing without an attorney, and requested a continuance to obtain representation. The hearing was thus postponed until January 19, 2006.

## APPLICABLE STANDARDS

Because Claimant filed this subsequent claim for benefits after March 31, 1980, the regulations set forth at Part 718 apply. *Lane v. Union Carbide Corp*., 105 F.3d 166, 170 (4th Cir. 1997); *Saginaw Mining Co. v. Ferda*, 879 F.2d 198, 204, 12 B.L.R. 2-376 (6th Cir.1989). This claim is governed by the law of the United States Court of Appeals for the Fourth Circuit, because the Claimant was last employed in the coal industry in the State of West Virginia, within the territorial jurisdiction of that court. *Danko v. Director*, *OWCP*, 846 F.2d 366, 368, 11 B.L.R. 2-157 (6th Cir. 1988). *See Broyles v. Director*, *OWCP*, 143 F.3d 1348, 1349, 21 B.L.R. 2-369 (10th Cir. 1998); *Kopp v. Director*, *OWCP*, 877 F.2d 307, 12 B.L.R. 2-299 (4th Cir. 1989); *Shupe v. Director*, *OWCP*, 12 B.L.R. 1-200 (1989) (*en banc*).

In order to establish entitlement to benefits under Part 718, the Claimant must establish that he suffers from pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment, and that his pneumoconiosis is a substantial contributor to his total respiratory disability. 20 C.F.R. §§ 718.1, 718.202, 718.203 and 718.204 (2004). *Lane*, 104 F.3d at 170. *See Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 141, 11 B.L.R. 2-1 (1987); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 708, 22 B.L.R. 2-537 (6th Cir. 2002), *cert. denied*, 538 U.S. 906 (2003). *See also Roberts & Schaefer Co. v. Director, OWCP*, 400 F.3d 992, 998, __ B.L.R. ___ (7th Cir. 2005).

The Claimant has the burden of proving each element of entitlement to benefits by a preponderance of the evidence. *Director*, *OWCP v. Greenwich Collieries*

[*Ondecko*], 512 U.S. 267, 18 B.L.R. 2A-1 (1994), *aff'g* . *Greenwich Collieries v. Director*, *OWCP*, 990 F.2d 730, 17 B.L.R. 2-64 (3d Cir. 1993). The failure to prove any requisite element precludes a finding of entitlement. *Anderson v. Valley Camp of Utah*, *Inc*., 12 B.L.R. 1-111 (1989); *Perry v. Director*, *OWCP*, 9 B.L.R. 1-1 (1986) (*en banc*).

### ISSUES

The following issues are before the undersigned for adjudication:

1. Whether the Claimant has waived his right to representation.
2. The length of the Claimant's qualifying coal mine employment.
3. Whether the Claimant has established a change in an applicable condition of entitlement.
4. If so, whether the Claimant has pneumoconiosis as defined in the Act and the regulations and whether his pneumoconiosis arose out of coal mine employment.
5. Whether the Claimant is totally disabled.
6. Whether any total respiratory disability is due to pneumoconiosis.
7. Whether the Employer is the correctly named responsible operator.

*See* DX-20.

## FINDINGS OF FACT AND CONCLUSIONS OF LAW

### FACTUAL BACKGROUND

Although provided the opportunity to do so, Claimant declined to testify. In filing his subsequent claim, Claimant submitted an employment history form CM-911a, which details nearly four years of coal mine employment with Eastern Associated Coal Company, followed by 8.75 years of coal mine employment with Slab Fork Coal Company. DX-5. At the hearing, counsel for the Employer offered to stipulate to nine years of employment with Slab Fork. Tr. 10. The subsequent claim record contains a copy of a letter from the employee relations manager at Eastern Coal attesting to Claimant's employment with that mine from October 27, 1969 until September 25, 1973. DX-6. The Social Security earnings statement, admitted into the record at DX-7, is consistent with these documents. There is no evidence of coal mine employment subsequent to July, 1982.

Although the focus of a subsequent claim record is on medical evidence that has been developed after the final denial of the previous claim, the Claimant's testimony in a prior hearing is relevant in the determination of length of coal mine employment and the correct responsible operator. Claimant testified at the June 30, 1994 hearing that he had not worked since 1982. He was unsuccessful in finding work in the mines, and then washed cars for about two years. DX-1: Tr. (6-30-94) 18.

On November 14, 1996, Claimant was awarded benefits for a 60% permanent partial disability due to occupational pneumoconiosis under the West Virginia Workers' Compensation Act. DX-2.

## MEDICAL EVIDENCE

*Chest X-Rays*

| Ex. No. | X-Ray/Reading Dates | Physician | Credentials | Interpretation |
|---|---|---|---|---|
| DX-1 | 05-02-90/05-03-90 | C. Daniel | BCR | negative, quality 1 |
| DX-1 | 05-02-90/06-08-90 | G. Zaldivar | B | negative, quality 1 |
| DX-2 | 05-23-97/05-27-97 | M. Patel | B/BCR | 0/1, quality 2 |
| DX-2 | 05-23-97/06-17-97 | D. Gaziano | B | negative, quality 1 |
| DX-12 | 10-28-02/10-29-02 | M. Patel | B/BCR | 0/1, quality 3 |
| DX-12 | 10-28-02/11-22-02 | C. Binns | B/BCR | quality 1 |
| EX-1 | 02-04-04/02-04-04 | G. Zaldivar | B | no pneumoconiosis, quality 2 |

*Pulmonary Function Test Evidence*

Pulmonary function studies are tests performed to measure obstruction in the airways of the lungs and the degree of impairment of pulmonary function. If there is greater resistance to the flow of air, there is more severe lung impairment. The studies range from simple tests of ventilation to very sophisticated examinations requiring complicated equipment. The most frequently performed tests measure forced vital capacity (FVC), forced expiratory volume in one-second ($FEV_1$) and maximum voluntary ventilation (MVV). The quality standards for pulmonary function studies are set forth at 20 C.F.R. § 718.103 (2004) and Appendix B.

The following chart summarizes the results of the pulmonary function studies in the record. "Pre" and "post" refer to administration of bronchodilators. If only one figure appears, bronchodilators were not administered. In a "qualifying" pulmonary study, the $FEV_1$ must be equal to or less than the applicable values set forth in the tables in Appendix B of Part 718, and either the FVC or MVV must be equal to or less than the applicable table value, or the $FEV_1$/FVC ratio must be 55% or less. 20 C.F.R. §

718.204(b)(2)(i).[3] *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 471 n. 1, 23 B.L.R. 2-44 (6th Cir. 2003); *Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 B.L.R. 2-259 (3d Cir. 1990).

| Ex. No. | Date | Age | HT. | $FEV_1$ | FVC | MVV | $FEV_1$/FVC | Qualify |
|---|---|---|---|---|---|---|---|---|
| DX-1 | 05-02-90 | 54 | 69" | 2.22 | 2.99 | 99 | 74% | No |

Claimant's cooperation and comprehension were noted as good. Dr. Daniel interpreted the results as demonstrating a "mild restrictive defect" and a "mild obstructive defect." Date is incorrectly noted on cover sheet as "2-5-90." I find that this test was conducted on May 2, 1990.

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| DX-2 | 05-23-97 | 61 | 68" | 1.96 | 2.64 | 52 | 74% | No |
| | | | | 2.18 | 2.87 | 73 | 76% | No |

Dr. Rasmussen noted good cooperation and comprehension in Claimant's performance of this test. The second set of results was obtained after the administration of a bronchodilator. Tracings are attached. Dr. Rasmussen stated that the test showed a "[m]inimal, irreversible ventilatory impairment [and that the] maximum breathing capacity is markedly reduced."

| | | | | | | | | |
|---|---|---|---|---|---|---|---|---|
| DX-12 | 10-02-02 | 65 | 68.5" | 1.73 | 2.58 | n/a | 67% | No |

Dr. Mullins observed good cooperation and comprehension in the performance of this test. The test is accompanied by tracings, and the study was validated by Dr. D. Gaziano, a board-certified internist. DX-12.

*Arterial Blood Gas Studies*

Blood gas studies are performed to measure the ability of the lungs to oxygenate blood. A defect will manifest itself primarily as a fall in arterial oxygen tension either at rest or during exercise. The blood sample is analyzed for the percentage of oxygen ($PO_2$) and the percentage of carbon dioxide ($PCO_2$) in the blood. A lower level of oxygen ($O_2$) compared to carbon dioxide ($CO_2$) in the blood indicates a deficiency in the transfer of gases through the alveoli which may leave the miner disabled. The quality standards for arterial blood gas studies are set forth at 20 C.F.R. § 718.105. A "qualifying" arterial gas study yields values which are equal to or less than the

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[3] Assessment of the pulmonary function study results is dependent on the Claimant's height. Measurements for Claimant's height have varied between 68 and 69 inches. I find that Claimant's height is 68.5 inches for purposes of evaluating the pulmonary function studies. *See Protopappas v. Director, OWCP*, 6 B.L.R. 1-221 (1983). *See also Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 114, 19 B.L.R. 2-70 (4th Cir. 1995).

applicable values set forth in the tables in Appendix C of Part 718. If the results of a blood gas test at rest do not satisfy Appendix C, then an exercise blood gas test can be offered. Tests with only one figure represent studies at rest only. Exercise studies are not required if medically contraindicated. 20 C.F.R. § 718.105(b) (2000); 20 C.F.R. § 718.105(b) (2004).

The following arterial blood gas study evidence has been admitted into the record.

| Ex. No. | Date | Physician | Alt. | pCO2 | pO2 | Qualify |
|---|---|---|---|---|---|---|
| DX-1 | 05-02-90 | Daniel | 0-2999' | 36 | 81 | No |
| | (exercise) | | | 30 | 105 | No |

Exercise trial ended when Claimant complained of chest pain.

| | | | | | | |
|---|---|---|---|---|---|---|
| DX-2 | 05-23-97 | Rasmussen | 0-2999' | 39 | 81 | No |
| | (exercise) | | | 39 | 79 | No |

Dr. Rasmussen interpreted the results as normal.

| | | | | | | |
|---|---|---|---|---|---|---|
| DX-12 | 10-28-02 | Mullins | 0-2999' | 39.3 | 78.2 | No |

Exercise trial was contraindicated; Claimant explained that he would become short of breath with any exertion.

*Medical Opinions*

Medical opinions are relevant to the issues of whether the miner has pneumoconiosis, and whether the miner is totally disabled. A determination of the existence of pneumoconiosis may be made if a physician, exercising sound medical judgment, notwithstanding a negative x-ray, finds that the miner suffers from pneumoconiosis as defined in § 718.201. 20 C.F.R. § 718.202(a)(4) (2004). Thus, even if the x-ray evidence is negative, medical opinions may establish the existence of pneumoconiosis. *Taylor v. Director, OWCP*, 9 B.L.R. 1-22 (1986). *See Martin v. Ligon Preparation Co.*, 400 F.3d 302, 306, 23 B.L.R. 2-261 (6th Cir. 2005). The medical opinions must be reasoned and supported by objective medical evidence such as blood gas studies, electrocardiograms, pulmonary function studies, physical performance tests, physical examination, and medical and work histories. 20 C.F.R. § 718.202(a)(4).

Where total disability cannot be established by pulmonary function tests, arterial blood gas studies, or cor pulmonale with right-sided heart failure, or where pulmonary function tests and/or blood gas studies are medically contraindicated, total disability may be nevertheless found, if a physician, exercising reasoned medical judgment, based on medically acceptable clinical and laboratory diagnostic techniques, concludes

that a miner's respiratory or pulmonary condition prevents or prevented the miner from engaging in employment, i.e., performing his usual coal mine work or comparable and gainful work. 20 C.F.R. § 718.204(b)(2)(iv). With certain specified exceptions, the cause or causes of total disability must be established by means of a physician's documented and reasoned report. 20 C.F.R. § 718.204(c)(2). Quality standards for reports of physical examinations are set forth at 20 C.F.R. § 718.104.

The record contains the following medical opinions relating to this case.

*Dr. John M. Daniel*

Dr. Daniel examined Claimant on May 2, 1990. In his May 2, 1990 report, DX-1, he recorded complaints of a productive cough, dyspnea, wheezing and chest pain. The chest x-ray was "normal," the ventilatory study showed a "mild restrictive & obstructive defect," and the arterial blood gas test results were normal. Dr. Daniel diagnosed chronic obstructive pulmonary disease, and explained this diagnosis on the basis of a history of a chronic productive cough and abnormal pulmonary function studies. He further concluded that the etiology of Claimant's COPD was "obesity." With respect to disability, Dr. Daniel opined that there was "no evidence of significant pulmonary dysfunction." Non-cardiopulmonary diagnoses were obesity and hypertension.

*Dr. D. L. Rasmussen*

Dr. Rasmussen examined the Claimant on May 23, 1997. DX-2. His report, dated May 23, records complaints of a productive cough, wheezing, dyspnea, which for the previous 15 years had limited Claimant to walking one flight of stairs before shortness of breath, edema, hemoptysis and a cough. Dr. Rasmussen noted that Claimant's last coal mine work required him to work as a jack setter, use a sledgehammer to break rock, shovel and carry rock dust bags 600 feet. He characterized claimant's work as heavy and sometime very heavy manual labor. On physical examination, Dr. Rasmussen noted normal breath sounds and no rales, rhonchi or wheezing on auscultation. He also detected a heart murmur.

Dr. Rasmussen diagnosed COPD of undetermined origin based on a chronic productive cough and ventilatory impairment. He concluded that Claimant "has at least minimal pulmonary impairment [and that he] would be unable to perform very heavy manual labor." The etiology of this pulmonary impairment was "undetermined." DX-2. He noted that the x-ray "indicated pneumoconiosis p/p with a profusion of 0/1."

In an accompanying narrative, Dr. Rasmussen concluded that

> The patient has a significant history of exposure to coal mine dust. He has x-ray changes, however, which are insufficient to justify a diagnosis of pneumoconiosis. A diagnosis of coalworkers' pneumoconiosis cannot be established in this case.

> The patient's impaired function could be related to previous dust exposure and/or his obesity.

*Dr. Norma Mullins*

Dr. Mullins evaluated the Claimant for the Department of Labor on October 28, 2002. DX-12. Claimant provided a patient health history that included complaints of wheezing, arthritis, stomach cancer, diabetes and high blood pressure. Claimant related that he smoked for one year. Current complaints include daily wheezing, sputum production, dyspnea, coughing, chest pain, orthnopnea, ankle edema and nocturnal dyspnea. Claimant said that he can not lift or walk long distances without becoming short of breath.

On physical examination, Dr. Mullins observed diminished breath sounds on auscultation. The lungs were clear on percussion and normal on inspection and palpation. The extremities were also normal. Dr. Mullins also reviewed the results of clinical tests and a chest x-ray.

Dr. Mullins diagnosed chronic obstructive pulmonary disease. She also noted that Claimant's "C xray does not show irrefutable evidence of coal dust exposure[.]" She attributed the x-ray findings to "coal mine employment" and characterized the etiology of the COPD as "indeterminate[.]" With respect to disability, Dr. Mullins assessed:

> [The degree of severity:] moderate ventilatory impairment which would have prevent performance of last coal mine job – but etiology unclear – CXray does not show evidence of dust exposure … little smoking, relatively short exposure time for degree of impairment – may be weight related.

Dr. Mullins considered the disability causation to be "indeterminate." Dr. Mullins is board-certified in internal medicine and pulmonary disease.[4] DX-12.

[4] I find that Dr. Mullins has provided Claimant with a complete and credible pulmonary evaluation. 30 U.S.C. § 923(b); 20 C.F.R. §§ 718.101, 718.401, 725.405(b). *See Newman v. Director*, *OWCP*, 745 F.2d 1162, 7 B.L.R. 2-25 (8th Cir. 1984); *Pettry v. Director*, *OWCP*, 14 B.L.R. 1-98 (1990) (*en banc*). *See also Hall v. Director*, *OWCP*, 14 B.L.R. 1-51 (1990) (duplicate claim).

*Dr. George Zaldivar*

Dr. Zaldivar evaluated Claimant on February 4, 2004 at the request of the Employer. He submitted his report of this evaluation on February 23, 2004. EX-1. Dr. Zaldivar's conclusions are based on the physical examination, clinical tests, and the results of the complete pulmonary evaluation conducted by Dr. Mullins.

Claimant told Dr. Zaldivar that he was taking medication for an "irregular heart beat." He complained that he wheezes when he is near "perfume, chemicals or similar agents[,]" and has had a productive cough for two years.

Dr. Zaldivar recorded a coal mine work history of 14 1/2 years until 1981, when Claimant suffered a back injury. Claimant said that he worked as a beltman, motorman and a supply crewman, jobs that entailed a lot of heavy lifting and pulling.

Dr. Zaldivar recorded the following impression:

> 1. Peripheral edema, which may be due to obesity or it may be due to heart failure.
> 2. Murmur of undetermined source in the heart, perhaps mitral valve source.
> 3. History of near syncopal episodes, probably due to arrhythmia.
> 4. Marked increase in weight over his lifetime with symptoms … of drowsiness in the daytime compatible with sleep apnea.

Based on his review and examination, Dr. Zaldivar concluded that there was no radiographic evidence of pneumoconiosis. He also noted resting arterial blood gas results and found a "[m]ild restriction of vital capacity and total lung capacity with normal diffusion capacity." He concluded:

> 1. There is no evidence in this case to justify a diagnosis of coal workers' pneumoconiosis nor any dust disease of the lungs.
> 2. There is no evidence of pulmonary impairment.
> 3. There is a restrictive impairment caused by obesity, which is unrelated to the lungs. Obesity has restricted the capacity of the lungs to expand[.]
> 4. Strictly from a pulmonary standpoint, [Claimant] is fully capable of performing his usual coal mining work or work requiring similar effort. In fact, strictly from the pulmonary standpoint, [Claimant] is capable of performing arduous manual labor. He appeared to have cardiac disease, which would cause an impairment but this cardiac disease is the result of atherosclerosis and unrelated to his occupation.

> 5. Even if [Claimant] were found to have coal worker's pneumoconiosis, which in my opinion he does not have, my opinion regarding his pulmonary capacity and ability to work would be the same as I have given here.

EX-1. Dr. Zaldivar is board-certified in internal and pulmonary medicine, and is a B-reader.

*West Virginia Occupational Pneumoconiosis Award*

The record also contains a decision by a West Virginia Workers' Compensation administrative law judge granting Claimant a 60% permanent partial disability award for occupational pneumoconiosis. DX-2, 9. This award is relevant to the issues of whether Claimant suffers from pneumoconiosis, total respiratory disability, and disability causation, and will be evaluated along with the other relevant evidence. 30 U.S.C. § 923(b); 20 C.F.R. § 718.206. *See Miles v. Central Appalachian Coal Co.*, 7 B.L.R. 1-744 (1985); *Stanley v. Eastern Associated Coal Corp.*, 6 B.L.R. 1-1157 (1984). *See also Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*).

## DISCUSSION

### *Waiver of Representation*

The initial issue is whether the Claimant waived his right to representation. The Claimant appeared at the formal hearing without a representative. He had previously appeared without representation on June 8, 2005 before Administrative Law Judge Michael P. Lesniak. Judge Lesniak inquired whether the Claimant wanted additional time to secure the services of an attorney, and continued this case at the Claimant's request. By letter dated January 13, 2005, Judge Lesniak had informed Claimant about his rights to representation, and that he would not be responsible for the costs of representation. Judge Lesniak had also informed Claimant that he could request a continuance if he needed additional time to obtain representation. On June 9, 2005, counsel for the Employer sent Claimant a list of attorneys and lay representatives who represent individuals in black lung claims, along with their contact information.

At the formal hearing before the undersigned, the Claimant was informed that he has a right to representation by an attorney or lay representative at no cost to him. Tr. 7-9. Although the Claimant had apparently been provided a list of attorneys who might offer representation, he had not chosen counsel. The undersigned informed the Claimant that, if he had any questions about the proceedings, and how the evidence would be presented, then the hearing would "stop at anytime[.]" Tr. 8. The issues were discussed, and the Claimant was asked whether he had any questions. The burden of proof was discussed as well, and the Claimant was asked about his understanding of this concept. Tr. 11, 19. The Claimant was offered the opportunity to object to the introduction of the exhibits. He was specifically asked both about the Director's exhibits,

whether he had copies of those documents, and was also afforded the opportunity to object to the introduction of Dr. Zaldivar's report. The Claimant was also given the opportunity to testify, and he declined after an advisement. Tr. 17-19.

At the formal hearing, the undersigned found that the Claimant had made a knowing and voluntary decision to represent himself. Tr. 9. Upon consideration of the transcript of the formal hearing, I reaffirm that finding, and thus again find that Claimant has waived his right to be represented by an attorney or lay representative.[5] *See Shapell v. Director*, *OWCP*, 7 B.L.R. 1-304 (1984).

### *Length of Coal Mine Employment*

Counsel for the Employer offered to stipulate to nine years of coal mine employment with Slab Fork. The record also shows nearly three years of employment with Eastern Associated. DX-2. I credit the Claimant with at least 12 years of qualifying coal mine employment.

### *Responsible Operator*

The record does not show coal mine employment subsequent to the Claimant's work with Slab Fork. I find that Slab Fork is the properly designated responsible operator.

### *"Material Change in Conditions"*

After the expiration of one year from the denial of the previous claim, a subsequent claim must be denied on the basis of the prior denial unless a miner demonstrates with the submission of additional material that one of the applicable conditions of entitlement has changed since the date upon which the order denying the prior claim became final. 20 C.F.R. § 725.309(d).

To assess whether this change is established, the administrative law judge must consider all of the new evidence, favorable and unfavorable, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1362-63, 20 B.L.R. 2-227 (4th Cir. 1996) (*en banc*), *cert. denied*, 519 U.S. 1090 (1997). The Board has ruled that the focus of the material change standard is on specific findings made against the miner in the prior claim; an element of entitlement which the prior administrative law judge did not explicitly address in the denial of the prior claim does

[5] The finding that the Claimant has voluntarily and knowing waived his right to representation is made solely on the basis of the record. I do note in passing that pre-hearing discussions were conducted on this issue, and that the Claimant had represented himself in the hearing of the first claim. DX-1. The *Notice of Hearing and Pre-Hearing Order* ¶ 9 contains the advisement that claimants have the right to counsel without cost to them. ALJX-1.

not constitute an element of entitlement "previously adjudicated against a Claimant." *See Allen v. Mead Corp.*, 22 B.L.R. 1-63 (2000) (*en banc*). If a Claimant establishes the existence of that element, he has demonstrated, as a matter of law, a change in the applicable conditions of entitlement in a subsequent claim, and would then be entitled to a full adjudication of his claim based on the record as a whole. *See Rutter*, 86 F.3d at 1362-63. *See Allen v. Mead Corp.*, 22 B.L.R. 1-63 (2000) (*en banc*); *Cline v. Westmoreland Coal Co.*, 21 B.L.R. 1-69 (1997).

***Total Respiratory Disability – Subsequent Claim***

In this case, the previous claim was denied because the Claimant failed to establish pneumoconiosis and total respiratory disability. Accordingly, the Claimant may establish a change in an applicable condition of entitlement by proving one of these elements. As explained below, I find that the subsequent claim evidence establishes total respiratory disability.

The Claimant must establish he is totally disabled due to pneumoconiosis in order to be eligible for benefits under the Act. *See Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241, 243, 19 B.L.R. 2-1 (4th Cir. 1994). A miner is considered totally disabled if he has complicated pneumoconiosis, 30 U.S.C. § 921(c)(3), 20 CFR § 718.304, or if he has a pulmonary or respiratory impairment to which pneumoconiosis is a substantially contributing cause, and which prevents him from doing his usual coal mine employment and comparable gainful employment, 30 U.S.C. § 902(f), 20 CFR §§ 718.204(a), (b) and (c). I emphasize that *any* loss in lung function may qualify as a respiratory disability under Section 718.204(a). *See Carson v. Westmoreland Coal Co.*, 19 B.L.R. 1-16 (1964), *modified on recon*. 20 B.L.R. 1-64 (1996).

The Regulations provide a number of methods to show total disability other than by the presence of complicated pneumoconiosis: (1) pulmonary function studies; (2) blood gas studies; (3) evidence of cor pulmonale; and (4) reasoned medical opinion. 20 C.F.R. §§ 718.204(b)(2) and (d) (2004). I must weigh all of the relevant probative evidence which meets one of the four medical standards applicable to living miners under Section 718.204(b)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986), *aff'd on recon.,* 9 B.L.R. 1-236 (1987) (*en banc*). In the absence of contrary probative evidence, evidence which meets one of the Section 718.204(b)(2) standards shall establish Claimant's total disability.[6] *See Fields v. Island Creek Coal Co.*, 10 B.L.R. 1-19 (1987).

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[6] Lay testimony may also constitute relevant evidence. *See Madden v. Gopher Mining Co.*, 21 B.L.R. 1-122 (1999). A finding of total disability due to pneumoconiosis cannot be made solely on the miner's statements or testimony, however. 20 C.F.R. § 718.204(d). *See Tedesco v. Director, OWCP*, 18 B.L.R. 1-103 (1994).

*20 C.F.R. § 718.204(b)(2)(i)*

I find that the Claimant has not demonstrated total respiratory disability at Section 718.204(b)(2)(i) on the basis of the newly submitted pulmonary function study results. The values achieved on the tests submitted for the subsequent claim do not produce qualifying values.

*20 C.F.R. § 718.204(b)(2)(ii)*

I also find that the newly submitted arterial blood gas study results do not demonstrate total respiratory disability. Accordingly, the Claimant has not demonstrated total respiratory disability at Section 718.204(b)(2)(ii) on the basis of the arterial blood gas study evidence.

*20 C.F.R. § 718.204(b)(2)(iii)*

There is no evidence that the Claimant is afflicted with cor pulmonale with right-sided congestive heart failure. I therefore find that he has not demonstrated total respiratory disability at Section 718.204(b)(2)(iii).

*20 C.F.R. § 718.204(b)(2)(iv)*

I do find, however, that total respiratory disability has been demonstrated at Section 718.204(b)(2)(iv) on the basis of the medical opinion evidence in the subsequent claim record. Dr. Mullins thought that Claimant's moderate pulmonary impairment would prevent the Claimant from performing his last coal mine work. DX-12. The more problematic issue is whether Dr. Zaldivar's opinion, that the Claimant has a restrictive impairment related to his obesity, would qualify as a pulmonary or respiratory impairment at section 718.204(b)(2)(iv). I have duly noted Dr. Zaldivar's emphatic conclusion that the Claimant suffers from no pulmonary impairment, and that he could indeed perform arduous manual labor from that standpoint. I nevertheless find that, for purposes of defining respiratory disability under the Act, that *any* loss in lung function may qualify as a respiratory disability under Section 718.204(a). *See Carson v. Westmoreland Coal Co.*, 19 B.L.R. 1-16 (1964), *modified on recon*. 20 B.L.R. 1-64 (1996). I credit Dr. Mullins's assessment as sufficient to demonstrate total respiratory disability at section 718.204(b)(2)(iv).

Because the cause of any pulmonary disability is not a factor at Section 718.204(a), an opinion that the Claimant's obesity is the sources of any respiratory insufficiency, does not undermine a finding of total disability at Section 718.204(b)(2)(iv). I find that Dr. Zaldivar's diagnosis of a restrictive impairment caused by obesity nevertheless serves as a finding that the Claimant's lung function is diminished. His assessment does not significantly detract from the weight of Dr. Mullins's assessment of a moderate impairment that would preclude further coal mine work. In making this finding, I specifically find that, given the descriptions of the

exertional requirements of the Claimant's last coal mine job, that he was engaged in very heavy labor while so employed.[7]

*Fields – Shedlock Analysis*

The final step to determine whether the evidence establishes that the Claimant suffers from a totally disabling pulmonary or respiratory impairment. *See Shedlock v. Bethlehem Mines Corp.*, 9 B.L.R. 1-195 (1986), *aff'd on recon.,* 9 B.L.R. 1-236 (1987)(*en banc*). *See generally Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 B.L.R. 2-348 (7th Cir. 1990). Although the non-qualifying arterial blood gas tests and ventilatory tests and, to a lesser extent, the opinion of Dr. Zaldivar, constitute contrary probative evidence, I am persuaded by the medical opinion of Dr. Mullins that the Claimant does not have the pulmonary or respiratory capacity to return to his previous coal mine employment. Weighing all of the subsequent claim evidence, like and unlike, I therefore find that he has established total respiratory disability, a condition of entitlement previously adjudicated against him. 20 C.F.R. § 718.204(a). As noted above, I have also carefully reviewed the state occupational pneumoconiosis award, and accord it little probative weight.

**MERITS OF ENTITLEMENT**

In view of this finding, I conclude that the Claimant is entitled to an adjudication of this subsequent claim on the basis of the record as a whole. *See Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d at 1362-63.

[7] Although the West Virginia occupational pneumoconiosis award for a 60% permanent partial disability would tend to support a finding of total respiratory disability, I am unable to accord much weight to the award in this case. There is no clear explanation in the medical opinions that are cited by the state administrative law judge that the Claimant is precluded from returning to his usual coal mine work because of a pulmonary or respiratory disability. The issue is not whether the *administrative law judge* has provided an explanation of the award, but whether the medical opinion evidence is set forth in the state decision in such a manner as to allow the undersigned to assign such probative weight to which the medical opinion would be entitled. "'In weighing opinions, the ALJ is called upon to consider their quality,' taking into account, among other things, 'the opinions' reasoning' and 'detail of analysis.'" *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 532-33 n. 9, 21 B.L.R. 2-323 (4th Cir. 1998) (quoting *Underwood v. Elkay Mining*, *Inc.*, 105 F.3d 946, 951, 21 B.L.R. 2-23 (4th Cir. 1997)). The detail of analysis and reasoning of the Occupational Pneumoconiosis Board and physicians cited in the state award is not sufficiently persuasive on the issue of whether Claimant suffers from a total respiratory disability as it is defined in the Act. *See generally Clark v. Karst-Robbins Coal Co.*, 12 B.L.R. 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985).

### *Total Respiratory Disability*

Upon review of the record as a whole, and for the reasons as set forth in the above subsequent claim analysis, I find that the Claimant has established that he suffers from a totally disabling pulmonary or respiratory impairment. I have accounted for the tests and medical opinions that accompanied Claimant's earlier claims for benefits, and duly note that they have not, on balance, established total respiratory disability. Applying the subsequent claim analysis, however, I credit the more recent disability assessment by Dr. Mullins. Her opinion is buttressed by the assessment from Dr. Rasmussen, who likewise felt that the Claimant's respiratory impairment would prevent him from returning to the mines. DX-2. I note that, given the progressive nature of pneumoconiosis, *see Eastern Associated Coal Corporation v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 258, 22 B.L.R. 2-93 (4th Cir. 2000), the more recent evidence with respect to the nature and extent of the Claimant's pulmonary or respiratory *disability* would be the more probative of his condition at the time of the hearing. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 B.L.R. 2-147 (6th Cir. 1988). *See also Wetzel v. Director, OWCP*, 8 B.L.R. 1-139 (1985).

The Claimant has established this element of entitlement. 20 C.F.R. § 718.204(a).

### *Pneumoconiosis*

The existence of pneumoconiosis may be established by any one or more of the following methods: (1) chest x-rays; (2) autopsy or biopsy; (3) by operation of presumption; or (4) by a physician exercising sound medical judgment based on objective medical evidence. 20 C.F.R. § 718.202(a). Because this claim arises within the territorial jurisdiction of the Fourth Circuit, the adjudicator must weigh all of the evidence together in reaching a finding as to whether a miner has established that he has pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 B.L.R. 2-162 (4th Cir. 2000). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 B.L.R. 2-104 (3rd Cir. 1997).

#### *20 C.F.R. § 718.202(a)(1)*

The regulation at 20 C.F.R. § 718.202(a)(1) requires that "where two or more X-ray reports are in conflict, in evaluating such X-ray reports consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays."[8] In this

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[8] A "B-reader" (B) is a physician, but not necessarily a radiologist, who successfully completed an examination in interpreting x-ray studies conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health (ALOSH). A designation of "Board-certified" (BCR) denotes a physician who has been certified in radiology or diagnostic

vein, the Board has held that it is proper to accord greater weight to the interpretation of a B-reader or Board-certified radiologist over that of a physician without these specialized qualifications. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Allen v. Riley Hall Coal Co.*, 6 B.L.R. 1-376 (1983). Moreover, an interpretation by a dually-qualified B-reader and Board-certified radiologist may be accorded greater weight than that of a B-reader. *Roberts v. Bethlehem Mines Corp.*, 8 B.L.R. 1-211 (1985); *Sheckler v. Clinchfield Coal Co*., 7 B.L.R. 1-128 (1984). *Accord*, *Zeigler Coal Co. v. Director*, *OWCP* [*Hawker*], 326 F.3d 894, 899, __ B.L.R. ___ (7th Cir. 2003). Finally, a radiologist's academic teaching credentials in the field of radiology are relevant to the evaluation of the weight to be assigned to that expert's conclusions. *See Worhach v. Director*, *OWCP*, 17 B.L.R. 1-105 (1993). I emphasize, however, that the adjudicator is not required to defer to the interpretations by a radiologist who holds an academic position or professorship. *See Chaffin v. Peter Cave Coal Co.*, 22 B.L.R. 1-294 (2003). The party seeking to rely on an x-ray interpretation bears the burden of establishing the qualifications of the reader. *Rankin v. Keystone Coal Mining Co.*, 8 B.L.R. 1-54 (1985).

Upon review of the x-ray evidence of record, I find that the Claimant has not demonstrated the presence of pneumoconiosis at Section 718.202(a)(1). The record contains interpretations of four chest x-rays. No film has been interpreted as positive. The readings of "0/1" do not constitute positive interpretations. I therefore must find that the Claimant has not demonstrated pneumoconiosis at Section 718.202(a)(1) on the basis of chest x-ray evidence.

*20 C.F.R. § 718.202(a)(iv)*

There is no relevant biopsy or autopsy evidence. I therefore address the question of whether the Claimant has demonstrated the existence of pneumoconiosis on the basis of a reasoned medical opinion diagnosis of the disease. 20 C.F.R. § 718.202(a)(4).

Pneumoconiosis under the Act is defined as both clinical pneumoconiosis and/or any respiratory or pulmonary condition significantly related to or significantly aggravated by coal dust exposure:

> (a) For the purpose of the Act, ''pneumoconiosis'' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or ''clinical'', pneumoconiosis and statutory, or ''legal'', pneumoconiosis.
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> (1) *Clinical Pneumoconiosis.* ''Clinical pneumoconiosis'' consists of those diseases recognized by the medical community as pneumoconioses, *i.e.,* the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the

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roentgenology by the American Board of Radiology or the American Osteopathic Association.

> fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.
>
> (2) *Legal Pneumoconiosis.* ''Legal pneumoconiosis'' includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.

20 C.F.R. §§ 718.201(a)(1), (2).

In *Cornett v. Benham Coal Co.*, 227 F.3d 569, 575, 22 B.L.R. 2-107 (6th Cir. 2000)., the court emphasized that the "legal" definition of pneumoconiosis "'encompasses a wider range of afflictions than does the more restrictive medical definition of pneumoconiosis.'" (quoting *Kline v. Director*, *OWCP*, 877 F.2d 1175, 1178, 12 B.L.R. 2-346 (3d Cir. 1989)). *See Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 174, 19 BLR 2-265 (4th Cir. 1995). *See also Mitchell v. OWCP*, 25 F.3d 500, 507 n.12, 18 BLR 2-257 (7th Cir 1994); *Eagle v. Armco Inc.*, 943 F.2d 509, 511 n.2, 15 BLR 2-201 (4th Cir. 1991); *Old Ben Coal Co. v. Prewitt*, 755 F.2d 588, 591 (7th Cir. 1985) (chronic obstructive pulmonary disease meets statutory definition whether or not technical pneumoconiosis). Again, however, an obstructive pulmonary or respiratory impairment must be proven to have been significantly related to or substantially aggravated by Claimant's coal mine dust exposure. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 BLR 2-246 (4th Cir. 1996). *See generally* 65 Fed. Reg. 79943 (Dec. 20, 2000) (citing cases). Moreover, it must be emphasized that a finding that clinical pneumoconiosis has not been established does not preclude a finding of legal pneumoconiosis. *Cf. Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 892-93, 22 BLR 2-409 (7th Cir. 2002) (negative CT scan does not rule out legal pneumoconiosis).

Drs. Daniel, Rasmussen and Mullins have each diagnosed chronic obstructive pulmonary disease. Dr. Zaldivar has diagnosed a restrictive impairment. Certainly, while these physicians, especially Drs. Mullins and Rasmussen, have considered the possibility that Claimant's COPD has a link to his coal mine dust exposure, these physicians have not definitely attributed the COPD to coal mine dust exposure. There is no opinion that the COPD is significantly related to, or substantially aggravated by, the Claimant's coal mine dust exposure.

I have also carefully reviewed the state occupational pneumoconiosis award at Sections 718.202(a)(1) and 718.202(a)(4). I find that the medical opinions as set forth therein are not sufficiently documented and reasoned to demonstrate the existence of either "clinical" or "legal" pneumoconiosis. *See generally Clark v. Karst-Robbins Coal*

*Co.*, 12 B.L.R. 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 B.L.R. 1-46 (1985).

*20 C.F.R § 718.202(a)*

In view of the findings that the Claimant has failed to demonstrate the existence of pneumoconiosis under any specific subsection, I must find that pneumoconiosis has not been established. *Compton.*

***Disability Causation***

Assuming that the Claimant has established that he suffers from pneumoconiosis, I nevertheless find that he has not proven disability causation. Benefits are provided under the Act for, or on behalf of, miners who are totally disabled due to pneumoconiosis. 20 C.F.R. § 718.204(a) (2004). Pneumoconiosis must be a "substantially contributing cause" to the miner's total disability. 20 C.F.R. § 718.204(c)(1) (2004). The regulations define "substantially contributing cause" as follows:

> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. § 718.204(c)(1) (2004).

Upon review of the record as a whole, I find that the Claimant would not establish disability causation at Section 718.204(c). There is no opinion that relates the Claimant's respiratory disability to coal mine dust exposure or pneumoconiosis. At best, the physicians of record ascribe his pulmonary or respiratory impairment to obesity or an undetermined origin. Although it is suggested that the Claimant's coal mine dust exposure can be implicated, there is no persuasive or forthright opinion establishing disability causation at Section 718.204(c). Although I have found that the medical opinions that are mentioned in the state occupational pneumoconiosis award are not (as they are elaborated in the state decision) adequately documented or reasoned, I must also discount this award at Section 718.204(c) because there is no indication that the causation standard for the state award meets the causation standard under the Act.

In the final analysis, assuming that pneumoconiosis has been established, I am unable to find that the Claimant would establish disability causation by a preponderance of the evidence. Because the Claimant has not established either pneumoconiosis or disability causation, he is not entitled to benefits under the Act.

## ATTORNEY'S FEES

The award of an attorney's fee under the Act is permitted only in cases in which the Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to the Claimant for services rendered in pursuit of this claim.

## ORDER

The claim of C. M. for benefits under the Act is denied.

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WILLIAM S. COLWELL
Administrative Law Judge

Washington, D.C.
WSC:koj

**NOTICE OF APPEAL RIGHTS:** If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed. At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Allen Feldman, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).